United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL-CIO *and* Theatre Techniques, Inc. Case 2-CC-1553

26 August 1983

SUPPLEMENTAL DECISION AND ORDER

On 25 June 1979 the National Labor Relations Board issued its original Decision and Order in the above-entitled proceeding,[1] finding that Respondent violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, and ordering the Respondent Union to cease and desist therefrom and take certain affirmative action. Upon a petition for review and cross-application for enforcement of the Board's Order, the United States Court of Appeals for the District of Columbia denied enforcement of the Board's Order and remanded the case to the Board for further consideration consistent with its opinion.[2] The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board on remand. Subsequently, Respondent filed a statement of position.

The Board has reviewed the entire case in light of the court's opinion and the statement of position on remand and now makes the following findings:

The facts in brief are as follows: Theatre Techniques, Inc. (TTI), is a general contractor which supplies theatrical props, settings, and draperies. TTI and other general contractors submit bids to complete the set designs for a show after the producer of the show has chosen a designer to design the sets. If TTI is awarded the job, it subcontracts the construction, sculpture, and painting of set elements. Peter Feller is owner and president of TTI. At all times relevant, TTI's employees were unrepresented.

Nolan Scenery Studios, Inc. (Nolan), is also engaged in the production of theatrical settings, primarily the painting of scenery, including props. Occasionally it also fabricates (sculpts) scenery. Since approximately January 1977, TTI has subcontracted the painting of scenery and props to Nolan. TTI is Nolan's main customer, and provided Nolan with approximately 50 to 55 painting subcontracts between January 1977 and June 1978. Although Nolan generally submits a bid to TTI for the sculpting as well as painting work on a given show, TTI subcontracts sculpting work to Nolan infrequently. On two or three occasions, Nolan has acted as the general contractor and has subcontracted some carpentry work to TTI.[3] Nolan's president is Arnold Abramson.

Nolan is a party to a collective-bargaining agreement with Respondent. This agreement contains the following clause:

> 1. Scope: . . .
>
> For the purpose of clarification, it is specifically provided herein that the jurisdiction of the Union shall include all Scenic Artists work for Broadway and Regional Theatres. This includes painting and application of all decorative material when applied by any means including all scenic creative art work, whether applied by painting or otherwise. It is agreed between the parties that the jurisdiction of the Union with regard to sculpturing shall include drawings, pounces and application of pounces, modeling or sculpturing over and above the rough blocking, in accordance with past practice.

The alleged unfair labor practices involve the scenery for two plays: "Working" and "Stop the World I Want to Get Off." TTI obtained the general scenery contracts for these two plays and subcontracted the scenery painting work for them to Nolan. The subcontract for "Stop the World" included work on an "environment unit," a deck, and assorted props. TTI allowed Nolan to sculpt two of the elements of the environment unit as well as paint them.

On 3 and 8 May 1978[4] TTI shipped some of the props and materials for "Stop the World" to Nolan. As noted, all but two of the props had been sculpted elsewhere. On the morning of 9 May, TTI President Feller received a telephone call from Nolan's president, Abramson. Abramson informed Feller that his employees would not paint the props which had been sculpted elsewhere and that he had called the Union about the problem. Feller told Abramson that time was of the essence. Abramson called Feller back later that day to inform Feller that an agent of Respondent was coming to Nolan's facility on a "fact finding" mission and that "one way or another" Abramson would see that the props were painted.

Subsequently, LeBrecht, Respondent's assistant business agent, visited Nolan's facility. LeBrecht spoke separately with the show's designer, some of Nolan's employees, and Abramson. When LeBrecht asked where the sculpted props for "Stop

[1] 243 NLRB 27.

[2] *United Scenic Artists Local 829 v. NLRB*, 655 F.2d 1267 (1981).

[3] Fabricating or sculpting is the creation of a three-dimensional piece of scenery as in covering a frame to give dimension to a flat surface or to create a freestanding object. Carpentry is the construction of a prop's underlying frame.

[4] All dates hereinafter refer to 1978 unless otherwise indicated.

the World" had come from, Abramson replied that they had come from TTI.

On 10 May, Abramson called the Union's business representative, Domingo Rodriguez, and requested his permission to have the props painted. Rodriguez gave Abramson permission to have the employees paint the props, but told Abramson that Nolan was in violation of their collective-bargaining agreement which, he asserted, entitled Nolan's employees to sculpt the props that they paint. Rodriguez then told Abramson to estimate the time it would have taken Nolan employees to sculpt the props and said that the Union would assess a payment from Nolan based on that estimate.

On 11 May TTI shipped a prefabricated "stone wall" to Nolan as a last-minute addition to the props for the play "Working." On 12 May, Abramson telephoned Feller and told him that Nolan employees would not paint the wall and that he would ship it back to TTI unpainted. Abramson told Feller that he need not bother shipping Nolan another prop for "Working" which they had discussed earlier. That day, the Union sent Nolan a telegram which stated:

> It has come to our attention that you intend to paint sculpture which has not been produced by scenic artists employed by you. Painting of such sculpture constitutes a flagrant violation of Section 1 of the collective bargaining agreement between United Scenic Artists Local 829 an Theatrical Contractors Association, Inc., to which you are a party. We demand that any and all work on such sculpture be stopped immediately and that you immediately comply with your contractual commitments.
>
> It has also come to our attention that Nolan has entered into an illegal conspiracy with Theatre Techniques, Inc. [TTI] to deprive scenic artists of work opportunities. Please to be advised that this Union will take appropriate action to the maximum extent permitted by law to counteract the effects of your improper activities.

The wall for "Working" remained in the loading area of Nolan's facility for about 5 days and was never painted by Nolan's employees.

The Administrative Law Judge concluded that by its conduct the Union had induced employees to engage in work stoppages and that the Union had threatened to fine Nolan in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. In this regard, the Administrative Law Judge rejected Respondent's argument that the sole object of its activity was the preservation of unit work on the jobsite, finding instead that Respondent's object was to acquire all fabrication work for Nolan employees or employees of other companies under contract with Respondent.

Upon exception to the Administrative Law Judge's Decision, the Board concluded that the General Counsel had not established that Respondent violated Section 8(b)(4)(i)(B). The Board agreed with the Administrative Law Judge's further conclusion, however, that Respondent violated Section 8(b)(4)(ii)(B) by threatening to fine Nolan for, in essence, not acquiring the sculpting work over which TTI, not Nolan, had control. In this regard, the Board noted that union conduct is not rendered primary merely because it seeks to benefit the employees of the employer upon whom it is exerting pressure. Thus, while Rodriguez was exerting pressure on Nolan assertedly on behalf of Nolan's employees, he was in effect insisting either that TTI change its manner of doing business or that Nolan abrogate its contracts with TTI. And the Board found that such pressure, although applied in the form of a monetary penalty rather than by picketing, was unlawful secondary pressure within the meaning of Section 8(b)(4)(ii)(B).

On review, the United States Court of Appeals for the District of Columbia Circuit concluded that the Board's decision regarding the violation of Section 8(b)(4)(ii)(B) must have been based, in part, on an "apparent, albeit unstated, assumption" that Respondent Union knew that TTI possessed absolute contractual control over the disputed work. The court further held that the record herein contained inadequate evidentiary support for that assumption in light of Respondent's assertion that it had a reasonable good-faith belief that Nolan had the right to control the disputed work. The court directed that, on remand, the Board either develop adequate evidentiary support for the assumption that the Union knew that Nolan did not have control of the work or fully explicate any alternative rationale upon which the Board based its earlier decision.

Section 8(b)(4)(ii)(B) of the Act states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

> . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case any object thereof is. . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

The statute thus raises two questions—(1) what is the object of a union's conduct, and (2) does a union's conduct amount to threats, coercion, or restraint within the meaning of the statute? In determining the answer to the first question in our earlier decision herein, we turned to the Supreme Court's opinion in *NLRB v. Plumbers Local 638*,[5] which addressed precisely the issue presented here.

In *Enterprise*, the Supreme Court, contrary to the circuit, agreed with the Board that the union's conduct there had an unlawful secondary object under Section 8(b)(4)(ii)(B). Briefly, the key facts on which the Court relied were as follows: Austin, the general contractor on the "Norwegian Home" construction project awarded a subcontract for heating, ventilation, and air-conditioning work on the project to Hudik-Ross, whose employees were represented by Enterprise Association (the union). The subcontract incorporated Austin's job specifications which stipulated that the internal piping work on certain climate control units would be done by the manufacturer of those units. When the climate control units arrived at the jobsite, the union's members refused to install them asserting that, traditionally, members of the union had performed the internal piping work and that the union's contract with Hudik preserved such work for its members.

The Court in *Enterprise* found that the union's conduct could not be immunized by a provision in its contract with Hudik purporting to preserve the disputed work for union members and that the key question was whether there was sufficient support in the record for the Board's conclusion that an object of the union's inducement and coercion was to cause the cease-doing-business consequences prohibited by Section 8(b)(4)(B). Although the circuit court's view in disagreeing with the Board in *Enterprise* was "that other inferences from the facts were possible," the Supreme Court concluded that the "commonsense inference from these facts is that the product boycott was in part aimed at securing the cutting and threading work at the Norwegian Home job, which could only be obtained by exerting pressure on Austin."[6] Ultimately, the Court determined that it "was not error for the Board to conclude that the union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin in a manner prohibited by § 8(b)(4)(B)."[7] Stated differently, the Court found ample support in the record for the Board's inference that the union's conduct was "tactically calculated to satisfy union objectives elsewhere."[8]

Enterprise thus set the stage for our analysis. Here, as in *Enterprise*, the Union sought work it claimed it was entitled to under its collective-bargaining agreement. The Employer upon which it exerted pressure, Nolan, had no control over the disputed work And, the result of the Union's conduct was that Nolan ceased performing painting work which it had contracted with TTI to perform. Accordingly, based on analogous facts, we made the same inference and drew the same conclusion in our original decision here as we did in *Enterprise*.

The circuit court here appears to agree with Respondent that despite the similar factual patterns of *Enterprise* and the instant case, *Enterprise* is distinguishable in that here Respondent asserts it possessed a reasonable good-faith belief that No man had control of the disputed work and the General Counsel has not produced substantial evidence that Respondent actually knew that Nolan lacked such control. We note, however, that while the Supreme Court in *Enterprise* discussed at great length the nature of the test to be applied in secondary boycott cases and the application of that test to the facts before it, the Court neither raised the question of whether the union there had knowledge that Hudik lacked control over assignment of the work, nor did it imply that such knowledge was an essential element of a *prima facie* case. Moreover, while the Court explicitly approved the test used by the Board, it did not indicate in any way that such a test requires affirmative proof of the union's "state of mind" at the time of the alleged unlawful conduct before a violation of Section 8(b)(4)(B) can be found.

We think that this omission is not solely attributable to the absence of any argument by the union in *Enterprise* that it mistakenly believed that Hudik controlled the disputed work. Rather, it is explained by the Court's interpretation, since *Denver Building Trades*,[9] of the purpose of Section 8(b)(4). In *Denver Building* Trades the Court found that this section of the Act embodied the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from

[5] 429 U.S. 507 (1977).

[6] *Enterprise, supra* at 531.

[7] *Id.* at 530-531 Moreover, the Court in *Enterprise* specifically approved of the Board's use of the right-to-control test as part of its overall inquiry into the "totality-of-the-circumstances" regarding alleged 8(b)(4) violations.

[8] This test was set forth in *National Woodwork Manufacturers Ass. v. NLRB*, 386 U.S. 612, 644 (1967).

[9] *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951).

pressure in controversies not their own."[10] And, we can find no case since *Denver Building & Construction Trades*, in which the Court has looked to the subjective intent of the union, rather than to the nature of the employer upon which pressure is exerted; i.e., whether that employer is an "offending" employer, or is truly neutral.[11]

Accordingly, with all due respect to the court of appeals, we decline to place on the General Counsel the burden of establishing as an element of his *prima facie* showing in 8(b)(4) cases that a union, at the time it exerts pressure on an employer, has actual knowledge that the employer lacks control of disputed work except insofar as such knowledge may be inferred from proof that a union has exerted pressure on a neutral employer. We made that inference in our earlier decision and we make it here. We hasten to add that we do not make this inference lightly. We believe it to be fully consistent with the Court's analysis in *Enterprise*.[12] Moreover, we can find nothing in the statute's legislative history or other judicial gloss which would warrant a different conclusion. Finally, based on our experience in administering the Act, we cannot conclude that the Act's purposes would be well served by finding that a union has lawfully applied coercive pressure to a neutral employer in cases where the General Counsel cannot affirmatively establish the union's knowledge of the employer's neutrality. Such an approach as a practical matter would permit unions to exert pressure first and investigate the pressured employer's status later or, at least, would increase significantly the General Counsel's burden in a manner not contemplated or required by the statute.

Thus, although it may not have been explicitly stated, the implicit principle of our earlier decision was that, consistent with *Enterprise*, the General Counsel in an 8(b)(4)(ii)(B) case makes out a *prima facie* showing of a violation if he demonstrates that a union has exerted coercive pressure on a neutral employer. And, if the respondent fails to rebut effectively that showing, as we found earlier that Respondent failed to do in the instant case and as we discuss in more detail below, the General Counsel has established a violation of the Act.

This is not to say, however, that a union's lack of knowledge is not encompassed at all in the Board's totality-of-the-circumstances test. Indeed, there may be some extraordinary circumstances in which a union may counter the General Counsel's *prima facie* showing by establishing that it made reasonable good-faith efforts to ascertain whether the employer on which it exerted pressure was a neutral employer and that it was denied access to this information or deliberately misled.[13]

We place this high burden on a respondent union for several reasons. Most importantly, without the requirement of proof of deception or inaccessibility of information as to an employer's neutrality, the defense of lack of knowledge would be too conveniently raised and too readily taken advantage of. We must require from a union raising such a defense more than the bare assertion of lack of knowledge. Rather, a union must provide evidence that before it exerted pressure it attempted, but was unable, to find out whether the party to be pressured was a proper target for such pressure; i.e., a nonneutral employer. These facts, unlike a union's subjective intent, are susceptible to objective proof. And, particularly since the union is in the best position to establish the nature of its inquiry into the neutrality of the employer, placing the burden of adducing such evidence on the union cannot be said to be an unduly onerous burden. We empha-

[10] *Id.* at 692. Similarly, the Court of Appeals for the District of Columbia has held that the purpose of Sec. 8(b)(4) is "to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers." *Miami Newspaper Pressmen's Local 46 v. NLRB*, 322 F.2d 405, 410 (D.C. Cir. 1963).

[11] Thus we cannot agree with our dissenting colleague's construction of the Supreme Court's opinion in *Enterprise*. Contrary to the implication of the dissent, the Supreme Court in *Enterprise* at no point relied on the fact that the union there had contacted Austin directly. Rather, the Supreme Court clearly found that the violation in *Enterprise* consisted of the union's conduct *vis-a-vis* Hudik, at a time when Hudik had no control of the disputed work. Moreover, while the dissent here would require proof of the Union's awareness that its dispute rested with TTI, the Supreme Court's opinion in *Enterprise*, for the reasons set forth above, cannot be read as imposing such a requirement. We note also that the Court in *Enterprise* stated at 531, fn. 18: "The dissenters assert that '[n]othing whatever in the record even remotely suggests that the union had any quarrel with Slant/Fin or Austin.' The court has held, however, that there is no need for the Board to make such a finding in order to conclude that a § 8(b)(4)(B) violation has occurred."

[12] In addition to the above-quoted statement regarding the "commonsense inference" to be drawn from the union's conduct, the Court in *Enterprise* stated that by "seeking the work at the Norweigan Home. the union's tactical objects *necessarily* included influencing Austin . . . ." (Emphasis supplied.) *Enterprise, supra* at 530, fn. 16. This language echoes the language in *Denver Building Trades Council, supra* at 688. There the Court stated that the group of unions which was picketing a construction site because of the presence of a nonunion subcontractor "*must* have included among its objects that of forcing Doose & Lintner [the general contractor] to terminate the subcontract." (Emphasis supplied.) In *Ohio Valley Carpenters v. NLRB*, 339 F.2d 142, 145 (6th Cir.1964), the Sixth Circuit has similarly stated, "The Board has held several times that, if a Union demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute, it is manifest that an object of the union is to induce the cessation of business. . . . We think this is rational and proper reasoning." Such language supports the inferring of union "object" from objective conduct.

[13] In *Broadcast Employees NABET (CBS, Inc.)*, 237 NLRB 1370 (1978), enfd. 631 F.2d 944 (D.C. Cir. 1980), and *National Broadcast Employees NABET (Osprey Productions)*, 226 NLRB 641 (1976), the Board found that union claims of a mistaken belief that a primary employer was present at the jobsites which they picketed were insufficient to render their picketing of neutral employers lawful. We note that in both cases there was evidence indicating that the unions knew or could have easily found out that a primary employer was not present. However, to the extent that our decisions in those cases or our decision in *Teamsters Local 85 (Graybar Electric)*, 243 NLRB 665 (1979), are inconsistent with the instant decision, they are hereby overruled.

size that we do not envision that the instances in which this defense will be found meritorious will be many.

As we found in our original decision, Respondent has clearly not rebutted the General Counsel's *prima facie* case. However, since the circuit court has questioned our earlier interpretation of the record, we shall again analyze the facts. Turning to the record before us, we find nothing which effectively counters the inference that Respondent knew that Nolan lacked control of the disputed work. And, we find further that the record actually supports this inference. As an initial matter, we note that in the circuit court's view the Board overlooked the testimony of Union Business Representative Rodriguez. However, with all due respect to the court, the Administrative Law Judge discredited the testimony of Rodriguez, Respondent's sole witness, in its entirety. We found no basis for reversing the Administrative Law Judge's credibility resolutions in our earlier decision and, upon a thorough reexamination of the record, we find no basis for reversing them now.[14] Accordingly, we place no reliance on Rodriguez' testimony assertedly supporting a "mistaken belief" as to Nolan's neutral status.

Furthermore, we find it significant that Rodriguez' assistant, LeBrecht, who was sent by Respondent on a factfinding mission to Nolan's shop, did not testify. The record does show that at Nolan's shop LeBrecht spoke to employees, to the designer of the show in question, and to Abramson. Abramson's version of his conversation with LeBrecht, upon which we must rely since LeBrecht did not testify, indicates that LeBrecht was only concerned with where the sculpted props had come from, not which party had control of the sculpting work. Indeed, we find no evidence in the record that LeBrecht sought this information and was denied it or was misled, or that LeBrecht even included it among the facts he was trying to ascertain.

Additionally, as noted above, TTI was Nolan's primary customer, and in the vast majority of shows on which Nolan worked for TTI, Nolan received the subcontract for painting only. The fact that Nolan's contract was confined to painting on most shows was surely self-evident to Respondent's members working in Nolan's shop. Moreover, Respondent must have known that for the most part Nolan had subcontracts for painting only rather than general contracts for entire shows since, despite regular union contact with Abramson regarding union problems (including an earlier grievance under the same contractual clause invoked here), there is no evidence that Respondent ever protested Nolan's failure to do both painting and sculpture on a show prior to the incident giving rise to the instant case. Accordingly, although Abramson testified that the Union was not regularly informed of the nature of Nolan's subcontracts and that he did not commonly discuss his contractual arrangements with the Union, there is more than sufficient basis to conclude that the Union was generally aware of the customary contractual practice between Nolan and TTI.

In view of this knowledge, it was incumbent on the Union to ascertain whether in this instance Nolan's contracts with TTI for the shows in question included sculpturing and were thus an exception to customary practice, or whether the two props which TTI allowed Nolan to sculpt for "Stop the World" were exceptions to a painting subcontract for that show. In this regard, there is no competent evidence that Nolan or TTI sought to conceal the nature of their contracts. Further, aside from LeBrecht's factfinding mission, Rodriguez had vast experience in the business (about 30 years) and contact with many potential sources of the relevant information. Thus, the Union had a steward in every shop and Rodriguez or one of his assistants contacted each shop on a weekly basis in order to compile a shop report listing which studios with employees represented by the Union were engaged in the production of which shows.[15] Additionally, Rodriguez had frequent contact with the set designers[16] and, by his own admission, frequent contact with Abramson. In view of all the foregoing, we cannot find that Respondent has established that it could not, with good-faith effort, have found out that Nolan lacked control of the disputed sculpting work. Accordingly, having found that Respondent was neither denied access to information about Nolan's neutral status nor misled in that regard, we conclude again that an

[14] The circuit court cites as uncontroverted Rodriguez' testimony that, when Rodriguez asked Nolan President Abramson if Nolan had the contract for the sculpture work, Abramson replied in the affirmative and stated that the designer "had requested" that TTI execute the pieces in question. However, later at the hearing when Respondent's counsel asked Rodriguez, ". . . did Mr. Abramson tell you whether he had the right to decide who would build the sculpture," Rodriguez responded, "No." And, when counsel for the General Counsel later asked Rodriguez if he had ever asked Abramson if he had the contract to sculpt the props, Rodriguez answered, "Well I knew he had the contract to paint it," and "I would have to *assume* that anybody that has the painting contract under our bargaining agreement has the sculpting contract . . . . To my knowledge there's no distinction." (Emphasis supplied.) In discrediting Rodriguez, the Administrative Law Judge specifically observed that Rodriguez vacillated in his accounts of his discussions with Abramson involving TTI, an observation amply borne out by the above portions of the record. We note that we relied on Rodriguez' testimony in our earlier decision only to the extent that it constituted admissions.

[15] The shop report itself does not indicate the nature of the various contracts for work on a given show.

[16] The designers are union members and are paid through Respondent.

object of Respondent's conduct must have been the unlawful one of influencing TTI.[17]

In its remand to the Board, the circuit court additionally noted Respondent's alternative argument with regard to the object of its activity, i.e., that a request for premium pay from an immediate employer even where that employer is powerless to award the disputed work constitutes primary activity.[18] We specifically addressed this issue in our earlier decision. As we stated there, relying again on *Enterprise*, a union's efforts are not rendered primary simply because it seeks to benefit the employees of the employer upon whom it is exerting pressure. Further, we found that the Union's attempt to impose unilaterally extracontractual monetary sanctions was merely an attempt to substitute one kind of economic pressure, a monetary sanction, for the more conventional pressure resulting from picketing. We concluded then and we again conclude that such change in the form of the pressure could not transform Nolan from a neutral to a nonneutral employer or, stated differently, could not transform the Union's object from a secondary to a primary one.[19]

Additionally, the Court in *Enterprise* appears to have specifically considered the relationship of premium pay to a union's object under Section 8(b)(4). The Court noted that the circuit court in *Enterprise* had suggested that Enterprise's object might have been primary since Hudik (the subcontractor) could have possibly settled the dispute by negotiating a deal with the union whereby the union would have installed the climate control units in exchange for extra pay or benefits. Referring to this suggestion by the circuit court, the Supreme Court stated, "How this observation impugns the Board's finding with respect to the union's object is not clear."[20] The Court then went on to say that "the commonsense inference" was that the union's object was the secondary one of obtaining work over which only the general contractor had control, the implication being that this was a secondary object regardless of whatever compromise, such as premium pay, the union might have ultimately settled for.

Finally, the circuit court here notes that the Union contends that its request for an estimate of hours did not amount to "coercion" within the meaning of Section 8(b)(4)(ii)(B). We cannot agree with the Union's contention.

The Fifth Circuit has held that:

> Congress used "coerced" in the section under consideration [8(b)(4)] as a word of art and . . . it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation and pressure in the background of a labor dispute.[21]

Threatening to fine an employer for work not done clearly falls within the ambit of "other economic retaliation and pressure." In this regard, in our earlier decision we relied on *J. L. Simmons Co., supra*. There the union offered to abandon its threat not to hang certain premachined doors at a hospital facility if the employer would agree to give premium pay for the installation of the doors. We stated:

> The proposal itself is coercive in that it either penalizes Simmons for continuing to do business with the Hospital Association in accordance with their agreement by having to absorb premium pay costs, or forces Simmons to seek contract renegotiation, with its inherently coercive impact, in order to avoid such additional costs. We therefore view the premium pay proposal as no more than a substitution of one form of economic pressure for another. . . .[22]

By analogy, in the instant case although Rodriguez gave Abramson, to use Rodriguez' word, "permission" to have union members paint the props, his request for extracontractual premium pay for work which Nolan employees had not performed and for which Nolan would not receive payment was in effect as coercive as other, perhaps less subtle, forms of pressure. This was particularly so since behind Rodriquez' "permission" to paint the props and his concomitant request for premium pay stood the thinly veiled threat of a work stoppage in a business in which time, as TTI President Feller told Abramson, was of the essence. And Rodriquez' request was all the more coercive in view of Rodriguez' admitted knowledge that Nolan had been having persistent financial difficulties, was behind in his payments to the Union, and was struggling "to get out from under" Chapter 11 bankruptcy proceedings.[23]

[17] Although it is not a predicate to our finding of a violation, we note that TTI employed no members of Respondent, and that, in its telegram to Nolan, Respondent accused Nolan of conspiring with TTI to deprive union members of work.

[18] Because it remanded the case on the other grounds stated above, the court did not reach this argument of Respondent.

[19] See also *Carpenters Local 742 (J. L. Simmons Co.)*, 237 NLRB 564 (1978).

[20] *Enterprise, supra* at 531. See also fn. 16 of the Court's opinion.

[21] *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964).

[22] *J. L. Simmons Co., supra* at 565.

[23] In this context we cannot agree with our dissenting colleague that the threat to fine Nolan for not doing what, in fact, it had no power to do was no more coercive than submitting a dispute to the Board or a court for determination. To the extent that *Plumbers Local 455 (American Boiler Manufacturers)*, 154 NLRB 285 (1965), is inconsistent with our conclusion in this regard, it has been implicitly overruled by *J. L. Simmons Co., supra*, in which our dissenting colleague also participated.

In view of all the foregoing and with due respect to the circuit court, we reiterate our conclusion that Respondent has violated Section 8(b)(4)(ii)(B) of the Act. Accordingly, our earlier decision in this proceeding is hereby affirmed.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby affirms its Decision and Order issued 25 June 1979, in this proceeding (reported at 243 NLRB 27).

MEMBER JENKINS, dissenting:

The majority finds that the Union's request of Nolan for an estimate of hours, by which the Union would assess a payment due for Nolan's alleged contract violation, constituted "coercion" within the meaning of Section 8(b)(4), "particularly" because standing behind the request was a "thinly veiled threat of a work stoppage." I am not sure on what theory the majority finds "coercion" but for the supposed threat of a work stoppage, and I fail to see the basis of its finding that there was such a threat. In its original decision in this case, in which I did not participate, the Board found that the only evidence regarding a work stoppage was a conversation between Nolan's president, Abramson, and TTI's president, Feller, in which Abramson opined that Nolan's employees would not paint certain theatrical props shipped by TTI. There was no evidence of the mention of a work stoppage by the Union. But the majority apparently finds an implied threat because the Union's representative raised the subject of a payment during the same conversation in which he responded favorably to Abramson's request for permission to have the employees paint the TTI props. This finding is totally unwarranted. The union did nothing to suggest that Abramson need ask its permission in the first place, and when its representative took the occasion to warn him that a payment would be assessed in the future, there was no indication that such payment was a condition for the granting of "permission." Two days later, the Union sent Nolan a telegram demanding that Nolan comply with its contractual commitments to the Union's jurisdictional claims and warning of "appropriate action to the maximum extent permitted by law." Such a warning appears a strangely innocuous tactic if viewed as a followup to a threat of an unlawful work stoppage. It is at least as consistent with a pursuit of contractual remedies through established contract or judicial procedures.

A union's requirement of "reasonable compensation for what [it] considered was a breach of its contract" is equivalent to the submission of such a dispute to the Board or a court for determination—all peaceful methods of resolving its dispute without a threat of strike—and such conduct does not "threaten, coerce, or restrain" within the meaning of Section 8(b)(4)(ii)(B). *Plumbers Local 455 (American Boiler Manufacturers Assn.)*, 154 NLRB 285, 291–292 (1965) (Pierre Aircon incident), remanded 366 F.2d 815 (8th Cir. 1966), and reaffirmed on remand 167 NLRB 602, 604 (1967).[24] I would follow this well-considered precedent and dismiss the complaint here on that basis alone.

However, even assuming that the Union's conduct merited the term "coercion," the Union cannot be held to have had a secondary object absent proof that it knew TTI rather than Nolan had the right to control the assignment of fabrication work. The Union sought, through pressure on Nolan, to preserve the work of fabricating theatrical props as described in its agreement with Nolan. Nothing in *Enterprise*, on which the majority relies, affords a basis for inferring that pressure brought against an employer with whom a union has a bargaining relationship is "tactically calculated" to prevail in a dispute which the board presumes the union has with a stranger, where union knowledge of the stranger's role in the matter has not been proved.

Union knowledge was not discussed in *Enterprise* for the simple reason that direct proof of such knowledge was not essential in the circumstances of that case. The union had an agreement with a heating and air-conditioning contractor (Hudik), the jurisdictional provisions of which agreement it sought to enforce. Hudik's general contractor (Austin) was present at the jobsite and the union approached Austin directly with its insistence that the internal piping work (which Austin had written out of Austin's contract with subcontractor Hudik) was the work of the union's members. *Enterprise, supra*, 429 U.S. at 512–513. In finding an 8(b)(4)(ii)(B) violation the Board, ultimately affirmed by the Supreme Court, noted specifically that the union went to Austin, the stranger, involving it in the dispute that ostensibly was only with Hudik. 204 NLRB 760 (1973). In the instant case, on the other hand, there is no evidence of an attempt to involve TTI, or any other neutral employer, in the Union's dispute with Nolan. For, absent evidence either that the Union approached

[24] The Eighth Circuit affirmed the Board's dismissal after remand of this part of the case, without reaching the issue of the correctness of the above rationale. 404 F.2d 547, 555 (1968), cert. denied 398 U.S. 960. The majority's statement that this case was "implicitly overruled by *J. L. Simmons Co.*," (237 NLRB 564), a case in which the union expressly made premium pay a *quid pro quo* for working on the boycotted product, is unfounded.

neutral persons directly, as in *Enterprise*, or that it knew its pressure on Nolan would affect neutrals more than incidentally, there is simply no basis for inferring such an unlawful object.

The majority errs in analyzing this case as though it were a common situs picketing case. The fundamental principles for determining whether a union's object is primary or secondary are the same for all cases; it is nonetheless proper, in a common situs picketing case, to place on the union which has chosen to take its appeal to a site occupied by neutrals some burden of limiting the effect to the employer with which it has a primary dispute. The interests of all persons attempting to do business at a common situs would be affected drastically by a total work stoppage at the site, and this fact makes it tactically feasible for a union to coerce neutrals into aiding it in its dispute with the primary employer. Such consideration are implicit in our *Moore Dry Dock* standards[25] and our reserved gate doctrine. See also *Retail Clerks Local 1017 v. NLRB*, 249 F.2d 591, 599 (9th Cir. 1957) ("[A] union must exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute."). Here, however, the Union's conduct was limited to a telephone conversation with the primary employer, initiated by the employer. If the pressure the Union brought to bear on that employer, the only person with which it asserts it has a dispute, is comparable to picketing at all, it is comparable to picketing at premises occupied solely by the primary employer. The impact on any neutrals in such situations is, to all appearances, incidental. Only if we can find the union knew the impact of its pressure would be felt more than incidentally by a neutral may we even consider inferring that its conduct was "tactically calculated" to satisfy a hidden objective involving such a neutral. Thus, the majority stands Section 8(b)(4) on its head when it places on a union the burden of conducting an investigation, before exerting pressure on an employer with which it has a contract dispute, to negate the possibility that the employer is a neutral in disguise. The placing of such a burden is as impractical as it is doctrinally unsound. For, if a neutral employer is confronted with union pressure to do something of which it is incapable, but does not know whether the union knows it is incapable, it seems little enough for the employer to present the union with that fact. If it refrains from doing so, and there is no other evidence that the union knew the employer was really an innocent bystander, invocation of the Board's processes is, at best, premature.

[25] *Sailors' Union (Moore Dry Dock)*, 92 NLRB 549 (1950).